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COURT OF CRIMINAL APPEALS
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NO. PD-0653-20

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

RAUL BAHENA, Appellant

VS.

THE STATE OF TEXAS, Appellee

On Petition for Discretionary Review from
The Fourteenth Court of Appeals
in No. 14-18-00760-CR Affirming
The 177th Criminal District Court of
Harris County, Texas, Cause No. 1552218,
Honorable Leslie Brock Yates, Judge Presiding

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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Oral Argument Requested

INDEX

NAMES OF ALL PARTIES

Pursuant to Tex. R. App. P. 38.1(a), the following are interested parties:

Presiding Judge:	Leslie Brock Yates 177th Criminal District Court 1201 Franklin Street Houston, Texas 77002
Appellant:	Mr. Raul Bahena Texas Department of Criminal Justice TDCJID# 02217122 Clemens Unit 11034 Hwy. 36 Brazoria, Texas 77422
Attorneys for State:	Mr. Jason Sanchez District Attorney's Office 1201 Franklin Street, Suite 600 Houston, Texas 77002 Mr. Daniel McCrory (on appeal) District Attorney's Office 1201 Franklin Street, Suite 600 Houston, Texas 77002
Attorneys for Appellant:	Ms. Patricia Segura (trial) 8614 Hemlock Hill Houston, Texas 77083 Mr. Crespin Michael Linton (appeal) 440 Louisiana Street, Suite 900 Houston, Texas 77002

LIST OF AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 39.1, Appellant requests oral argument.

STATEMENT OF THE CASE

The Appellant was charged with Aggravated Robbery With A Deadly Weapon. After a jury trial, the jury found Appellant guilty of Aggravated Robbery With A Deadly Weapon. The jury sentenced him to a term of 25years in the Texas Department of Criminal Justice - Institutional Division.

PROCEDURAL HISTORY

All points of error were affirmed by the Fourteenth Court of Appeals on June 23, 2020, in a published opinion. No motion for rehearing was filed.

GROUND FOR REVIEW

GROUNDS FOR REVIEW

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ADMISSION OF A DISC OF INMATE TELEPHONE CALLS OVER APPELLANT'S OBJECTION THAT THE STATE'S WITNESS WAS NOT THE CUSTODIAN OF RECORDS.

REASON FOR REVIEW

THE COURT OF APPEALS HAS DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THE COURT OF CRIMINAL APPEAL'S POWER OF SUPERVISION.

STATEMENT OF FACTS

Sometime between 10:30 p.m. and 11:00 p.m. on May 19, 2017, Appellant robbed Monica Soria at gunpoint as she sat in her boyfriend Dominque Morales' car that was parked in a park across the street from her home. Soria testified that Appellant initially approached the driver's side of Morales' car and requested cigarettes which they did not have. She stated that Appellant returned about 30 seconds later and robbed them at gunpoint. Soria explained that she recognized Appellant as having attended the same Middle School although she admitted that she did not personally know him. Soria testified that she identified Appellant as the robber on May 20, 2017 from viewing a photo array prepared by Harris County Constable Del Toro. Harris County Constable Whiteley testified that Appellant lived with family near the park where Soria and Morales were robbed.

Over Appellant's hearsay objection that the State's witness was not the custodian of records, Harris County Deputy Larry Franks played several recorded inmate telephone calls from the Harris County Jail which Deputy Franks testified were made by Appellant in which Appellant admitted to the armed robbery of Soria. The trial court allowed the recorded inmate telephone calls despite the fact that the State never listed Deputy Franks as a custodian of records witness and despite the fact that even Franks testified that Deputy Pete Galvan, and not him, was the custodian of records who prepared the disc of Appellant's inmate telephone calls for trial.

ARGUMENTS AND AUTHORITIES

GROUND FOR REVIEW ONE

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ADMISSION OF A DISC OF INMATE TELEPHONE CALLS OVER APPELLANT'S OBJECTION THAT THE STATE'S WITNESS WAS NOT THE CUSTODIAN OF RECORDS.

REASON FOR REVIEW

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THE COURT OF CRIMINAL APPEAL'S POWER OF SUPERVISION.

DISCUSSION

The Court of Appeals incorrectly affirmed the trial court's admission of a disc of inmate telephone calls over Appellant's objection that the State's witness was not the custodian of records for the disc of these recorded calls.

The Texas Rules of Evidence defines hearsay as a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. **Tex. R. Evid. 801(d)** (West 2020) **Rule 802 of the Texas Rules of Evidence** provides that "[h]earsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority." (West 2020) **Rule 803(6) of the Texas Rules of Evidence** provides that records of a regularly conducted activity are not excluded as hearsay if a custodian or another qualified witness testifies in court or executes an affidavit that complies with Rule 902(10) of the Texas Rules of Evidence to the following: 1) the record was made at or near the time by – or from information transmitted by – someone with knowledge, 2) the record was kept in the course of a regularly conducted business activity, and 3) making the record was a regular practice of that activity, and 4) the opponent fails

to demonstrate that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.

The Court of Appeals ruled that the Appellant had failed to show that Deputy Franks was not either a custodian of records or another qualified witness to testify about the recording of Appellant's jail call under Rule 803(6) of the Texas Rules of Evidence.

First, Deputy Franks was not the custodian of records for either the recordings made by Securus or the recordings copies by Harris County personnel because the State failed to present any evidence that Franks had 1) custody, maintenance authority, or control over the original recordings, 2) access to the original recordings made by Securus, 3) the ability to copy original recordings made by Securus, 4) any knowledge surrounding the copying of Harris County's copy onto the disc presented at trial, or 5) familiarity with how any relevant recordings were kept, accessed, modified, or copied onto discs.

Second, Appellant contends that Franks was not "another qualified witness" because there was no evidence that he had personal knowledge of the mode of preparation of the disc of inmate telephone calls. In fact,

Franks' testimony was limited to the fact that Harris County used the private company named Securus to operate the system that recorded inmate telephone calls and that he listened to the disc of calls before his appearance in court. Franks never testified that he had any relevant first-hand knowledge concerning the way any recording was kept, accessed or copied. His testimony was devoid of any fact which permitted the court to presume the strict requirements set forth in Rule 803(6) had been satisfied. The Court of Appeals ruled that the Appellant failed to preserve error by failing to object that Franks was not an "another qualified witness" under Rule 803(6) and supported its ruling by citing the opinion of **Melendez v. State**, 194 S.W.3d 641, 644 (Tex. App. – Houston [14th Dist.] 2006, pet. ref'd) However, the court in **Melendez** never ruled that the error had not been preserved by failing to object to the witness as not "another qualified witness," but that the Appellant failed to present evidence to show that the witness was not a qualified witness. In this case, Appellant contends that the record is devoid of any evidence that Franks was qualified to testify to the authenticity of Appellant's inmate telephone calls.

Appellant also contends that Appellant demonstrated that the method of preparation of the inmate telephone calls was untrustworthy because

there is lack of proof that the disc contained Appellant's calls when many of the inmate rent their identification numbers to other inmates for those inmates to make telephone calls from jail and when Deputy Franks admitted that the disc of calls was labeled with the name of a different inmate that Appellant.

Appellant contends that the appellate court erred in siding with the trial court by allowing the admission of inmate telephone calls by ruling that Deputy Franks could testify as custodian of records for these telephone calls. Therefore, the Court of Appeals erred in determining that Deputy Franks was a custodian of records or another qualified witness for the admission of the recordings of Appellant's inmate telephone calls.

PRAYER FOR RELIEF

For the reasons stated, Appellant Bahena prays the Court to grant his Petition For Discretionary Review, and after considering the grounds for review, reverse the judgment of the court of appeals and grant the relief requested.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 1804 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton
Crespin Michael Linton

CERTIFICATE OF SERVICE

I do hereby certify that on this the 24th day of August 2020, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Harris County, Texas, 1201 Franklin Street, Suite 600 Houston, TX 77002 at mccrory_daniel@dao.hctx.net and the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 at information@spa.texas.gov.

/s/ Crespin Michael Linton
Crespin Michael Linton

APPENDIX A

Opinion In the Court of Appeals

For The Fourteenth District of Texas

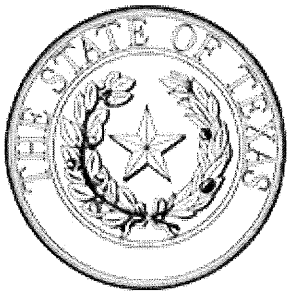
No. 14-18-00760-CR

Raul Bahena,
Appellant

v.

State of Texas,
Appellee

Affirmed and Majority and Dissenting Opinions filed June 23, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-00760-CR

RAUL BAHENA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1552218

MAJORITY OPINION

Appellant Raul Bahena challenges his conviction for aggravated robbery. In three issues appellant asserts (1) the evidence is insufficient to support his conviction, (2) the trial court erred in failing to charge the jury on a lesser-included offense, and (3) the trial court abused its discretion in allowing a State's witness to give evidence of jailhouse calls. We affirm.

I. Factual and Procedural Background

The complainant, a high school student who worked as an assistant manager of a sandwich shop, closed the shop at ten o'clock in the evening. A friend picked her up from the shop to give her a ride home. On the way to the complainant's home, the two friends stopped at a nearby park to talk and listen to music.

As the friends sat in the parked car, a man, whom the complainant later identified as appellant, approached and asked for a cigarette. When the complainant's companion said he had none, the man walked away. Moments later the man returned wielding a gun. He took the complainant's backpack.

The next day, Detective Eusevio Del Toro with Harris County Constable Precinct 4 took a written statement from the complainant. The complainant made a positive identification of appellant from a photo array.

The same day, law-enforcement officers answered disturbance calls at the Bahena home in Cypress, Texas, located near the park where the complainant was robbed. They arrested appellant's brother after a short foot chase, and then returned to the same home an hour later for a disturbance involving appellant and appellant's cousin. Officers established a perimeter around the Bahena house and brought a canine unit to assist in locating appellant. After an hour of searching, a police dog found appellant hiding in a neighbor's backyard. At the time, the officers were unaware that appellant was a suspect in the complainant's case. Appellant was not in possession of the complainant's property at the time of the arrest.

In searching for appellant and appellant's brother, the officers found the complainant's debit card and another person's credit card in the brother's jacket when they apprehended him. Meanwhile, a Cypress homeowner who also lived near the park called the school district to report property scattered across the

homeowner's backyard. Among the items found were a backpack, the complainant's Cypress Woods High School identification card, the complainant's Texas driver's license, a sandwich-shop apron, a ball cap with the complainant's nametag, and the complainant's achievement certificate.

Indicted for the felony offense of aggravated robbery by use or exhibition of a deadly weapon, appellant elected to have a jury trial on guilt-innocence, and for the judge, if necessary, to assess punishment. The jury found appellant guilty of the offense charged in the indictment. At the conclusion of the punishment hearing before the trial judge, the State urged the court to assess punishment at forty years' confinement. The trial court assessed appellant's punishment at twenty-five years' confinement. On appeal, appellant presents only issues pertaining to the guilt/innocence phase of his trial.

II. Issues and Analysis

A. Is the evidence sufficient to support appellant's conviction for aggravated robbery?

In his first issue, appellant asserts that the evidence is insufficient to support his conviction. In evaluating this complaint, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State,* 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or

disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the jury resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

The indictment alleged that appellant "on or about May 20, 2017, . . . while in the course of committing theft of property owned by [the complainant], and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place [the complainant] in fear of imminent bodily injury and death, and the Defendant did then and there use and exhibit a deadly weapon, namely, a firearm."

One commits the offense of aggravated robbery if one commits robbery and uses or exhibits a deadly weapon. Tex. Penal Code section 29.03(a)(2). One commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, one intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code, section 29.02(a)(2). A deadly weapon is "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury," or, "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code, section 1.07(a)(17).

The trial court's jury-charge instructions tracked the indictment, and the instructions were consistent with the language for an aggravated-robbery offense under the Penal Code. Appellant contends in his sufficiency challenge that the State failed to prove that he "robbed [the complainant] with a firearm."

Use or Exhibition of a Firearm

The complainant testified that after the initial encounter with appellant and his request for a cigarette, appellant returned about 30 seconds later and pointed a black handgun at the complainant and her companion, stating, "This is a stick-up. Give me everything you have." According to the complainant, for "maybe three minutes," appellant pointed the handgun, waved the gun around, and demanded that the complainant turn over her purse. The complainant saw appellant "cock" the firearm when the two friends failed to comply with appellant's demand. The complainant had no purse, but she turned over what she did have—a backpack containing her wallet, a debit card, a gift certificate, her school identification, her hat, and the key to the sandwich shop. The companion turned over his hat. Then, when the companion attempted to start the car, appellant reached into the car and fought with him to keep him from doing so. Appellant's efforts proved unsuccessful. The companion started the car and "sped off" driving "on to the grass and off the curb."

The black handgun the complainant described was not offered into evidence. Nor does the record contain any mention of the handgun having been recovered. But the complainant testified that she believed the gun was real, that it could cause death or serious injury, and that appellant's wielding of the gun caused her to be scared. The complainant testified that when appellant approached the car with the handgun, he demanded that they give him their belongings. The complainant testified that appellant pointed the gun at her and her companion and that appellant waved the gun around for roughly three minutes and cocked the gun to prompt compliance with his demand. *See Johnson v. State*, 509 S.W.3d 320, 324 (Tex. Crim. App. 2017) (finding that a jury reasonably could have inferred that a butter knife, based on the wielder's threats, proximity to the complainant, the brandishing of it, the manner used, or intended to be used "rendered it capable of causing serious

bodily injury or death.").

Though at some point the complainant testified that she believed the gun was not loaded, this evidence does not mean that the evidence is insufficient to support a finding that appellant used or exhibited a deadly weapon. *See Thomas v. State*, 36 S.W.3d 709, 711 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) ("The State is not required to show that a firearm was operable or even loaded."); *see also Aikens v. State*, 790 S.W.2d 66, 67–68 (Tex. App.—Houston [14th Dist.] 1990, no pet.) ("firearm discovered in complainant's car need not be serviceable in order to be classified as a deadly weapon"). The record contains sufficient evidence to sustain the deadly-weapon finding and to sustain a finding that the "black handgun" the complainant described was "used or exhibited" during the robbery. *See Johnson v. State*, 509 S.W.3d at 324 (knife found to be a deadly weapon even though the knife was not entered into evidence and complainant and video could provide only limited information that the blade of the knife was a couple of inches long and was used to threaten the complainant and other witnesses).

Identity

Based on a liberal construction of appellant's brief, he also challenges the sufficiency of the evidence identifying appellant — as opposed to his brother — as the perpetrator. As with every other element of an offense, the State must prove beyond a reasonable doubt that the accused is the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). A defendant's identity and criminal culpability may be proved either through direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Fang v. State*, 544 S.W.3d 923, 928 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The complainant testified that she recognized appellant when he first approached the car in the park.

She testified that she went to middle school with appellant and was friends with his cousin. During her trial testimony, the complainant identified appellant as the one who committed the offense, and a law-enforcement officer testified that the complainant identified appellant during the police investigation. When presented with photos of both appellant and his brother, the complainant affirmatively and unequivocally identified appellant as the gun-wielding robber, and stated that appellant's brother was not the person who robbed her. The complainant's testimony alone is sufficient to support the element of identity. *Walker v. State*, 180 S.W.3d 829, 832–33 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("A conviction may be based on the testimony of only one eyewitness.").

Intent

Although appellant has not specifically challenged the element of intent, we note that criminal intent may be inferred from an accused's acts, words, or conduct, as well as the surrounding circumstances of the acts. *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998); *Neelys v. State*, 374 S.W.3d 553, 559 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (finding evidence sufficient to establish defendant's criminal intent to not return his sister's phone when he forcibly took the phone and fled from her home); *Williams v. State*, 770 S.W.2d 948, 949 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (concluding that sufficient evidence supported conviction for theft because the record reflected the accused took a necklace from a person and fled without making any efforts to return the necklace). Jailhouse calls revealed that a caller with a male voice using appellant's identification numbers and codes tried to convince others to bribe the complainant so that she would either recant her allegations or not cooperate with the State. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (holding that "[a]ttempts to conceal incriminating evidence. . .are probative of wrongful conduct

and are also circumstances of guilt."). We conclude that the record evidence suffices to establish the element of appellant's intent.

Sufficiency of the Evidence

Under the applicable standard of review, a rational trier of fact could have found beyond a reasonable doubt that appellant intentionally threatened the complainant with fear of imminent bodily injury or death, by using and exhibiting a deadly weapon, in the course of committing theft and with intent to obtain or maintain control of the property. *See Johnson v. State*, 509 S.W.3d at 324; *Walker v. State*, 180 S.W.3d at 832–33; *Neelys v. State*, 374 S.W.3d 553, 559; *Guevara v. State*, 152 S.W.3d at 50. Finding no merit in appellant's challenge to the sufficiency of the evidence supporting his conviction for aggravated robbery, we overrule appellant's first issue.

B. Did the trial court reversibly err when it denied appellant's requested jury instruction for the lesser-included offense of robbery?

In his second issue, appellant argues that the trial court erred by omitting from the jury charge an instruction on the lesser-included offense of robbery. The trial court overruled appellant's objection to the trial court's omission of a charge on this lesser-included offense.

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Tex. Code Crim. Proc. Ann. art. 37.08 (West, Westlaw through 2019 R.S.). We apply a two-prong analysis to determine whether the trial court should have included a lesser-included offense instruction in the jury charge. *State v. Meru,* 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *Hall v. State,* 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007).

In the first prong, we compare the elements of the offense as charged in the

indictment or information with the elements of the asserted lesser-included offense. *Meru,* 414 S.W.3d at 162; *Hall,* 225 S.W.3d at 535–36. This first-prong inquiry presents a question of law and does not depend on evidence adduced at trial. *Hall,* 225 S.W.3d at 535; *Shakesnider v. State*, 477 S.W.3d 920, 924 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The State does not dispute that the first prong is met—the offense charged in the indictment, aggravated robbery, contains all of the elements of the proposed lesser-included offense of robbery. *See* Tex. Code Crim. Proc. Ann. art. 37.09(1); *Palacio v. State*, 580 S.W.3d 447, 454 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) ("An offense is a lesser-included offense of the charged offense if the indictment for the greater offense. . . alleges all of the elements of the lesser-included offense."); *see Penaloza v. State*, 349 S.W.3d 709, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)("Robbery is a lesser included offense of aggravated robbery."). The only difference between the two offenses is that aggravated robbery, as charged in this case, requires an additional finding that the defendant used or exhibited a deadly weapon. *See* Tex. Penal Code Ann. §§ 29.02, 29.03 (West 2010); *Penaloza v. State*, 349 S.W.3d at 711. So, we turn to the second-prong inquiry and consider whether the record contains some evidence from which a jury rationally could find that appellant is guilty of robbery but not guilty of aggravated robbery. *Penaloza*, 349 S.W.3d at 711; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). The evidence must establish the lesser-included offense as a "valid rational alternative to the charged offense." *Sweed*, 351 S.W.3d at 68.

We review all of the evidence presented at trial. *Id.* Anything more than a scintilla of evidence suffices to entitle a defendant to a lesser charge. *Sweed v. State*, 351 S.W.3d at 68. Although a scintilla of evidence presents a low threshold, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater

offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id.* If some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations, then the standard is met and the instruction is warranted. *Id.* We review the trial court's decision on the submission of a lesser-included offense for an abuse of discretion. *Davison v. State*, 495 S.W.3d 309, 311 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Appellant argues that the jury reasonably could have found that appellant committed the offense of robbery without using a firearm based on what appellant interprets as a contradiction within the complainant's testimony. First, the complainant testified that she was not that familiar with guns. Specifically, she stated that she was not that familiar with the difference between a semi-automatic gun and a revolver. Appellant juxtaposes this testimony with the complainant's later testimony that she knew the gun appellant was holding was not loaded because he cocked it twice without a shell being discharged. Appellant contends these statements are contradictory, and argues that from this purported contradiction we can infer that the complainant believed the gun was a toy. We disagree with the reasoning appellant would have us follow.

The complainant's testimony was not contradictory—one may know quite a bit about one type of gun without knowing anything about another type of gun, including how the two types differ. But even presuming for the sake of argument that the complainant's statements were contradictory, appellant's proposed inference—that the complainant believed the gun to be a toy—is a giant leap, not a logical step or a reasonable deduction. At no point did the complainant testify that she believed appellant's gun to be a toy, nor was the complainant even asked the

question. No toy guns were ever found, and appellant never produced or offered any evidence on the use or exhibition of toy guns. Rather, the complainant's uncontroverted testimony shows that appellant was holding a real gun, and that the complainant knew this to be true because she saw it.

The only evidence concerning the events of the robbery came from the complainant's testimony and she described the offense as one carried out with a "black handgun." Because the record contains no other evidence directly germane to the lesser-included robbery-without-a-firearm offense for the finder of fact to have considered, an instruction on the lesser-included offense of robbery was not warranted. *Sweed v. State*, 351 S.W.3d at 68; *Penaloza v. State*, 349 S.W.3d at 713. The trial court did not err in omitting the instruction.

We overrule appellant's second issue.

C. Did the trial court reversibly err by permitting Deputy Franks to testify?

In his third issue, appellant asserts the trial court abused its discretion when it admitted the testimony of Sergeant Larry Franks with the Harris County Sheriff's Office, whom the State called as a witness to authenticate the recordings of jailhouse telephone calls.

The State had not listed Deputy Franks on the State's witness list. Franks testified about recorded telephone calls made from the Harris County Jail. He explained that the telephone calls are stored according to each inmate's specifically assigned number (SPN number), which the inmate enters along with the inmate's personal identification number into the phone before any call can be made. Franks testified that he recorded on a disc telephone calls placed from the jail by a caller who was using appellant's identification numbers and codes. Franks played recordings of telephone calls made on May 25, 2017, September 6, 2017, September 20, 2017, November 23, 2017, December 31, 2017, January 11, 2018, and May 1,

2018. In these recordings, a caller with a male voice discusses the robbery of the complainant and the possibility of paying the complainant for recanting or not cooperating with the prosecution. In some calls, the caller can be heard speaking with individuals about not attending trial and evading subpoenas. In one call, on November 23, 2027, the caller expresses regret for pointing his gun at his cousin, Yessica,[1] and considers that to be the reason he was in jail, noting that it prompted her to "call the law."

Appellant complains that the trial court abused its discretion (1) in overruling appellant's objection that Franks should not be allowed to testify because the State had not designated him timely on its witness list, and (2) in overruling appellant's objection that Franks was not the custodian of records for the recordings of the jailhouse calls.

Allowing an Untimely-Designated Witness to Testify

Appellant complains that the trial court erred in overruling appellant's objection to Franks's testimony based on the State's failure to designate him timely on its witness list. Appellant alleges that he suffered surprise as a result of the untimely designation. The decision to allow a witness that was not on the State's witness list to testify falls within the trial court's discretion. *See Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993). A reviewing court considers whether the State acted in bad faith and whether the accused reasonably could have anticipated the witness's testimony in determining whether the trial court abused its discretion in allowing testimony from a witness not identified on the State's witness

[1] The record indicates that appellant's cousin, is "Yessica Bahena" or "Jessica Bahena", as both spellings were used to describe the same person at trial and in the clerk's record.

list. *See id.*

Appellant does not contend that the State acted in bad faith when it failed to disclose Franks on its witness list, and the record contains no evidence that would support such a finding. Appellant does not dispute the State's contention that appellant had access to the recordings of the jailhouse calls or that he was aware these records exist.[2] A month before trial, the State listed Franks's name on the subpoena list filed with the trial court and publicly available. These facts suggest that the State intended to make appellant aware that it would present evidence of the jailhouse calls at trial yet failed to reveal how it would present proof of the records. The record does not suggest that the prosecutor acted in bad faith or intended to deceive appellant by the omission. *See Irvine v. State*, 857 S.W.2d 920, 927 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

We next consider whether appellant reasonably could have anticipated that the State would call Franks to testify. We take into account (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise (i.e., the defendant was aware of what the witness would say, or the witness testified about cumulative or uncontested issues); and (3) the degree to which the trial court was able to remedy that surprise (i.e., by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness's criminal history). *Hamann v. State*, 428 S.W.3d 221, 227–28 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

Without proper notice, appellant fairly can claim some degree of surprise

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[2] The Clerk's Record shows that on June 11, 2018, the State filed its notice of intent to use "PCT 4 CALL LOG RECORDS" and named another individual as the custodian of records. The notice indicates that the records were uploaded on the same date, roughly two months before trial. Neither party has indicated whether these records are the pertinent records.

from the omission. But the State called Franks to introduce the jailhouse call records, and appellant has not argued that these records presented a surprise. Appellant does not dispute the State's contention that appellant had access to the recordings or that he was aware these recordings existed. Finally, when the trial court discovered that the State had not timely designated Franks as a witness, the trial court provided appellant a recess, and an opportunity to interview Franks before he took the stand to testify. Under these circumstances, taking into account the State's omission, Franks's role (to authenticate the recordings of the jailhouse calls), and the low degree of surprise or inherent prejudice from that surprise, we conclude the trial court's measures for addressing the untimely designation afforded appellant an appropriate remedy. *See Nobles*, 843 S.W.2d at 515 (surprise remedied by recess called by trial court to allow trial counsel to interview witness); *Hamann*, 428 S.W.3d at 228 (recess to allow trial counsel to interview fingerprint expert remedied any surprise by lack of inclusion on witness list). The trial court did not abuse its discretion in allowing this testimony.

Overruling of Objections that Witness was not Custodian of Records

Appellant also complains on appeal that Franks was not the custodian of the jailhouse call records and that the evidence of the jailhouse calls lacked trustworthiness based on Franks' testimony that many of the inmates rent their identification numbers to other inmates for those inmates to make telephone calls from the Harris County Jail. The trial record reflects that appellant did not preserve error in the trial court as to the latter complaint that the audio recordings lacked trustworthiness. *See Melendez v. State*, 194 S.W.3d 641, 644 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Appellant did not object to the testimony or the recordings as hearsay, or contend that the recordings lacked trustworthiness based on Franks's testimony that many of the inmates rent their identification

numbers to other inmates for those inmates to make telephone calls from the Harris County Jail. *See Melendez*, 194 S.W.3d at 644 n.4. Appellant's only objection under Texas Rule of Evidence 803(6) was that Franks was "not the custodian of records of these calls. It's Secure's company is." So, the only preserved issue before this court as to Rule 803(6) is whether the trial court abused its discretion by overruling this objection. *See Rothstein v. State*, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (stating that "[a] defendant's appellate contention must comport with the specific objection made at trial" and that "[a]n objection stating one legal theory may not be used to support a different legal theory on appeal."); *Melendez*, 194 S.W.3d at 644 n.4 (holding two complaints as to Rule 803(6) testimony were not before the appellate court because appellant had not preserved error in the trial court).

Though appellant preserved error in the trial court on his complaint that Franks was not the custodian of records of the recordings of these jailhouse calls, under Rule 803(6), a party may satisfy the required conditions through the in-court testimony of either "the custodian or another qualified witness." Tex. R. Evid. 803(6)(D) (stating that "all these conditions [the three required conditions stated in subsections (A) through (C)] [must be] shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10)"). Appellant did not object in the trial court that Franks was not "another qualified witness" or that Franks was not qualified to offer testimony under Rule 803(6). On appeal, appellant likewise complains that Franks was not the custodian of records but does not assert that Franks was not "another qualified witness" or that Franks was not qualified to offer testimony under Rule 803(6). In substantially similar circumstances, this court has held that the appellant's appellate issue failed to show that the witness was not a qualified witness for Rule 803(6)

purposes when the appellant complained that the record contained no evidence showing the witness was the custodian of records but did not complain that the witness was not "another qualified witness." *See Melendez*, 194 S.W.3d at 644. Following this precedent, we conclude that in his third issue appellant has failed to demonstrate that Franks was not a witness qualified to testify to the elements of the hearsay exception under Rule 803(6). *See id.* Even presuming that Franks was not the custodian of records, that status would not mean that he was unqualified to give Rule 803(6) testimony. *See id.* So, the trial court did not abuse its discretion in overruling appellant's objections to Franks's testimony authenticating the jailhouse call recordings. *See id.*

We overrule appellant's third issue.

III. CONCLUSION

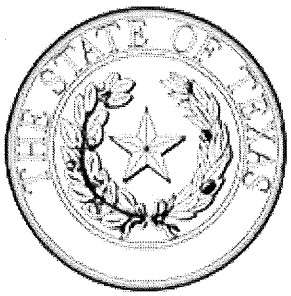
We conclude the evidence is legally sufficient to support appellant's conviction for aggravated robbery. We find no merit in appellant's argument that the trial court erred in failing to charge the jury on robbery as a lesser-included offense. And, we find no abuse of discretion in the trial court's overruling of appellant's objections to the testimony of the witness authenticating the jailhouse call recordings. Having overruled all of appellant's challenges on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J., dissenting).

Publish — TEX. R. APP. P. 47.2(b).

Affirmed and Majority and Dissenting Opinions filed June 23, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-00760-CR

RAUL BAHENA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1552218

DISSENTING OPINION

I dissent from the majority's holdings that (1) Sergeant Larry Franks of the Harris County Sheriff's Office was a custodian of records capable of authenticating the business records at issue and (2) Appellant forfeited his right to have the merits

of his objection heard because he did not simultaneously object that (a) Sergeant Franks was not a "qualified witness" and (b) the evidence was untrustworthy.

I. Relevant Facts

During a bench conference, the State was the first to mention its witness "testifying as an expert witness *only as custodian.*" (Emphasis added). This clearly contemplated and articulated representation was made in response to Appellant's objection that he had not received notice Sergeant Franks would be called to authenticate recordings of the jail phone calls at issue. These recordings were made by a third party (Securus)[1] then re-copied[2] by a fourth party (deputy Pete Galvan), neither of whom appeared for trial. The record establishes (1) Galvan was "the only deputy" with relevant recordkeeping duties, (2) Galvan placed the phone calls on the disk "and did all the work", and (3) Galvan's name was on the disk identifying him as the person who made it.

In response to an inquiry from the court, counsel for the State stated his belief that Galvan was identified in a subpoena as "custodian"; in response to an inquiry from Appellant's trial counsel, Franks stated he did not "recall getting a subpoena" but had "been in contact with ADA Sanchez for a week on this case." The record then reveals the following exchange:

> THE COURT: I think obviously counsel knows and it's well established that violation of a discovery order, if there was one, which apparently it appears that this witness was not disclosed, either this particular witness and possibly not even [the] custodian of record for the jail call [the] appropriate remedy is not exclusion of the evidence. It's a continuance and so I will

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[1] Securus is a corporation paid by Harris County to facilitate inmates' telephonic communications with the outside world. Although the company is misnamed in the trial transcript as "Secure", the correct name of the company that exclusively provides telephone service to detainees at the Harris County Jail is "Securus". *See* https://www.harriscountyso.org/JailInfo/inmate_info_inmate_phonecalls.aspx.

[2] The record is silent as to how this copy was made.

> grant as much time as you need to discuss this witness' credentials or whatever else you need to but I'm not excluding the evidence because frankly I'm still mad about a visiting Judge that excluded my evidence 20 years ago despite the fact that I told him that's what the law was. I know 25 years ago the law appropriate remedy not exclusion. I don't know how in the world there could be any surprise about this given the fact that we all listened to the tape yesterday, given the fact that you're aware of the fact there were jail calls going to be admitted into evidence there can be no surprise that **the State's calling a custodian of records** to admit that evidence. However if you feel like you need some time to further investigate or question him then the Court's going to give you how much time you need.
>
> [DEFENSE COUNSEL]: How is six months?
>
> THE COURT: How much reasonable time you need? So you want us to send the jury to breakfast and you can visit with the witness?
>
> [DEFENSE COUNSEL]: I think that's a good idea.

(Emphasis added).

The next mention of a "custodian of records" comes from the court: "And sergeant if you don't mind if you would please go visit with the lawyer and see if she's got any questions about your qualifications of a custodian of records or any other questions she may have." The next is from the State to Franks: "Is he [Galvan] also custodian of records?" to which Franks replied, "Yes." On appeal, the State's brief represents that, "Evidence established that Sgt. Franks was a custodian of records for the jail calls, even if the calls were maintained by an outside entity." The first time the phrase "qualified witness" is used (aside from a quotation of Texas Rule of Evidence 803(6)) is in the State's appellate brief.

After establishing that both the inmate's name on the disk and SPN on the disk were *not* Appellant's, Franks explained that (1) it was a "simple typographical

error or mak[ing] two disks at the same time", (2) he did not "know anything about the facts of this case", (3) he had no personal knowledge concerning the voices on the disc, (4) he did not know whether Appellant was in jail at the time the phone calls were recorded, (5) he had not heard the calls prior to trial, and (6) "we can pretty much guess it's him" when "a[n] inmate is calling a known person and that phone number is located that known person at the beginning when it asks this is a[n] inmate."

Appellant's trial counsel objected on the grounds that Franks was not the custodian of records and the court overruled the objection. The State then introduced and published the inculpatory recordings to the jury. During the call, someone can be heard saying, "It's f***ed up what I did. I pointed the gun at her . . . . She called the law, that's the only reason they caught me." This ostensible admission is consistent with the facts of this case. Appellant's relevant and timely argument on appeal tracks the objection he made at trial and questions concerning hearsay within hearsay have not been presented.

II. Hearsay and the "Business-Record" Exception

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and is inadmissible unless a statute or rule of exception applies. Tex. R. Evid. 801(d), 802. The proponent of hearsay has the burden to show the testimony fits within an exception to the general rule. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004); *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298, 301 (Tex. 1962); *see also Ortega v. Cach, LLC*, 396 S.W.3d 622, 629 (Tex. App.—Houston [14th Dist.] 2013, no pet.) and *Zhu v. Lam*, 426 S.W.3d 333, 342 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Hearsay exceptions are generally predicated upon the presence of sufficient indicia of reliability.

> The hearsay exception for regularly kept records is justified on grounds of trustworthiness and necessity that underlie other hearsay exceptions. Reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. The regularity and continuity of the records are calculated to train the recordkeeper in habits of precision .... The impetus for receiving these hearsay statements at common law arose when the person or persons who made the entry, and upon whose knowledge it was based, were unavailable because of death, disappearance, or other reason.
>
> The common law exception had four elements: (1) the entries must be original entries made in the routine of a business, (2) the entries must have been made upon the personal knowledge of the recorder or of someone reporting the information, (3) the entries must have been made at or near the time of the transaction recorded, and (4) the recorder and the informant must be shown to be unavailable. If these conditions were met, the business entry was admissible to prove the facts recited in it.

2 McCormick On Evid. § 286 (8th ed.); *see also Sellers v. State*, 588 S.W.2d 915, 919 (Tex. Crim. App. [Panel Op.] 1979) (concluding a statement lacked "the indicia of reliability necessary") and *Oveal v. State*, 164 S.W.3d 735, 746 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (Frost, J., concurring) (concluding hearsay lacked "the requisite indicia of reliability" to be admissible and citing *Martinez v. State*, 993 S.W.2d 751, 758 (Tex. App.—El Paso 1999), *rev'd*, 22 S.W.3d 504 (Tex. Crim. App. 2000); *Drayton v. State*, 135 S.W.2d 703, 704 (Tex. Crim. App. 1939); and *Hughes v. State*, 128 S.W.3d 247, 252-53 (Tex. App.—Tyler 2003, pet. ref'd)).

Records of regularly conduced business activities are only admitted when "all" specific conditions enumerated within the rule are "shown by the testimony of the custodian, or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10)." *See* Tex. R. Evid. 803(6)(D); *see also U.S.*

Commodity Futures Trading Comm'n v. Dizona, 594 F.3d 408, 415-16 (5th Cir. 2010) ("With respect to Rule 803(6), '[t]he exception requires that either the custodian of the business records or "other qualified witness" lay a foundation before the records are admitted.'") (quoting *United States v. Brown*, 553 F.3d 768, 792 (5th Cir. 2008)). *Cf. Guevara v. Ferrer*, 247 S.W.3d 662, 667 n.3 (Tex. 2007) (examination of federal precedent concerning rules of evidence is appropriate) (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998) ("[T]here is much to be said for maintaining as much uniformity in state and federal evidence rules as possible.")). "The business records exception to the hearsay rule applies only if the person who makes the statement 'is himself acting in the regular course of business.'" *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 279 (5th Cir. 1991) (citing *Fla. Canal Indus., Inc. v. Rambo*, 537 F.2d 200, 202 (5th Cir. 1976)).

III. Texas Rule of Evidence 803(6)

A. "Custodian of Records"

The phrase "custodian of records" as utilized in Texas Rule of Evidence 803(6) appears unambiguous; I am unaware of any argument here or anywhere that this term of art is so unclear that it requires interpretation. However, the majority's holding incorrectly (and without precedent) extends the meaning of this term to justify admission of hearsay even when the record does not tend to prove the proffered witness (1) was the "custodian" of any relevant thing or (2) had any relevant knowledge tending to create a sufficient indicia of reliability. *See Sneed v. State*, 955 S.W.2d 451, 454-55 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) ("The sponsoring witness for the evidence had no knowledge about the source or accuracy of the information contained in the proffered medical records. Thus, as to the basis of the statements and their medical accuracy, there is no evidence that establishes reliability or trustworthiness. As such, they lack the necessary indicia of

reliability sufficient to ensure the integrity of the fact finding process."); *see also id.* at 454 ("Even hearsay evidence falling within a recognized exception to the hearsay rule is inadmissible if it lacks the 'indicia of reliability sufficient to ensure the integrity of the fact finding process.'") (citing *Philpot v. State*, 897 S.W.2d 848, 852 (Tex. App.—Dallas 1995, pet. ref'd) (citing *Porter v. State*, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979))).

Under these facts, Franks is not a (and certainly not "the") "custodian of records" within the meaning of Texas Rule of Evidence 803(6)(D) for either the recordings made by Securus or the recordings copied by Harris County. First, there is no evidence Franks had (1) custody, maintenance authority, or control over the original recordings, (2) access to the original recordings made by Securus, (3) the ability to copy original recordings made by Securus, (4) any knowledge surrounding the copying of Harris County's copy onto the disk presented at trial, or (5) familiarity with how any relevant recordings were kept, accessed, modified, or copied onto discs. This absence precludes (1) the possibility that Franks had custody of the recordings for purposes of Rule 803(6); and (2) the propriety of concluding there is sufficient indicia of reliability concerning the recordings of Appellant's alleged out-of-court statements.

Second, this controlling absence of reliability and trustworthiness is compounded by (1) the incorrect name on the disk; (2) the incorrect SPN on the disk; (3) error purportedly predicated upon typography or making two disks at the same time;[3] (4) deputy Galvan being the only deputy with relevant duties; (5) deputy Galvan doing "all the work"; (6) deputy Galvan making the disk; (7) deputy Galvan

[3] The record also reflects that despite these material errors (rendering the hearsay untrustworthy), these recordings produced at trial "correspond with the usual practices of the Harris County Jail."

being unavailable at trial; (8) the absence of evidence as to whether the calls in question were complete (or, if they were incomplete, (a) why they were incomplete, (b) how they became incomplete, (c) who or what process made them incomplete, (d) when they were rendered incomplete, or (e) what evidence was removed to render them incomplete); (9) the fact that Franks did not know Appellant's voice or name; (10) the fact that Franks did not even know if Appellant was in the jail at the time the recording was made; and (11) Franks' "guess" that the voice on the recording was Appellant based on a disturbingly untrustworthy explanation about inmates calling "a known person and that phone number is located that known person at the beginning when it asks this is a[n] inmate."

Here, no evidence tends to prove Franks cared for or controlled the recordings in any way. Instead, the evidence simply permits us to (at most) presume he had access to the disk with the recordings at issue. This important distinction raises a significant question the majority leaves unaddressed. *See Jordan v. Commonwealth*, 74 S.W.3d 263, 269 n.13 (Ky. 2002) ("[W]hile Botts may have access to records, she is not the custodian of records. This raises substantial questions regarding whether the witness could lay a foundation for the evidence."); *see also Custodian*, Black's Law Dictionary (11th ed. 2019) ("A person or institution that has charge or custody (of a child, property, papers, or other valuables)").

Notably, Franks does not even refer to himself as the custodian of Securus's *or* Harris County's recordings; instead, the record reveals that both Franks and the State believed Deputy Galvan was the custodian.[4] No evidence permits us to

[4] The record reveals the State represented that it subpoenaed Deputy Galvan (not Franks) as "custodian". Although the State asked Franks, "Is he [deputy Galvan] also custodian of records?", it never asked whether he (Franks) was a custodian. Instead, the transcript reveals the State asked whether Galvan both (1) made the record at issue and (2) was also the custodian.

Q: . . . Sergeant I'm showing you what's been pre-marked as State's Exhibit 18. Do you

conclude Franks was the custodian of the original recordings or Harris County's copies of those recordings. These failures violate the guarantees of trustworthiness that are built into the exception. *See Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no. pet.) ("When an affiant's summary judgment affidavit contains testimony that identifies him as a record custodian and establishes his relationship with the facts of the case in a manner sufficient to demonstrate the facts at issue, the personal knowledge requirement for summary judgment affidavits may be satisfied."); and *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 359 (Tex. App.—Dallas 2007, pet. denied) (finding personal knowledge based on testimony that the affiant was custodian of records and a "foreclosure specialist" for the loan servicer). Even if Franks had represented that he was the custodian of records, the presentment of a generic job title with no supporting facts is nothing more than a conviction-oriented conclusion of law from a law-enforcement officer. *See Williams v. Commonwealth*, 546 S.E.2d 735, 742 (Va. Ct. App. 2001) (Benton, J., concurring) ("I agree with the majority's conclusion that the statute's second authentication requirement means the custodian must have custody of the document when the copy is made. No evidence tends to prove, however, that the copy of the certificate that was admitted into evidence was

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recognize this?
A. Yes I do.
Q. What is it?
A. It's a disk of phone calls.
Q. Okay. And the label on the disk is this pretty standard for Harris County Sheriff['']s Office?
A. Yes, sir.
Q. Okay. Does the label indicate the person who made the disk?
A. It says Elias Ramirez Fernandez.
Q. Does it indicate the person who actually put the phone calls on?
A. Deputy Pete Galvan. Deputy in my office.
Q. Is he also custodian of records?
A. Yes.

'accompanied by a certificate that [Hux] does in fact have the custody.' Nothing on the certificate indicates that fact . . . Hux's job title, 'custodian of records,' . . . does not establish that Hux had the original certificate in his possession when he certified the proffered copy to be a true copy. Being a generic 'custodian of records' does not prove custody of a particular document and certainly does not prove custody of the document when the copy was made.").

B. "Qualified Witness"

The majority also improperly casts aside Appellant's hearsay argument because he failed (at trial) to object based on the "qualified witness" prong of Texas Rule of Evidence 803(6). In doing so, the majority troublingly ignores the record while implicitly approving the trial court's admissions of evidence based upon uncontested hypothetical arguments that were never presented (thereby raising due process concerns both at trial and on appeal).[5] Even if the majority's interpretation of undisputed facts were accepted to mean that the "qualified witness" prong should be considered on appeal, its reasoning remains flawed.

The State was the first to utilize the phrase "custodian of records" at trial and never (until appeal) used the word "qualified". The trial court was the next to mention the "custodian of records" and never mentioned a "qualified witness"; instead, the record reveals the court stated (*at trial*), "the State's calling a custodian of records." There is no fact permitting us to reasonably infer that the issue of "qualified witness" was even presented to (much less ruled upon by) the trial court. Even if I were to ignore the record and accept that the trial court overruled Appellant's objection because it concluded the State satisfied its burden by

[5] *Contra Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994) ("Based upon [Appellant's] objection [to hearsay] and the State's response thereto, it is obvious that the trial court and the parties were well aware that the evidence was being proffered as an exception to the hearsay rule as a statement against the passenger's penal interest.").

establishing Franks was a "qualified witness", it abused its discretion when it did so (especially because there is no evidence Appellant had (1) notice or a meaningful opportunity to be heard on this apparently dispositive issue or (2) any relevant burden (*see infra*)).

Franks is not a qualified witness under Texas Rule of Evidence 803(6) because there is no evidence he had "personal knowledge of the mode of preparation of the records." *See Montoya v. State*, 832 S.W.2d 138, 141 (Tex. App.—Fort Worth 1992, no pet.).[6] "The requirement of firsthand knowledge is a rule more ancient than the

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[6] *See also Ermisch v. HSBC Bank USA*, No. 03-16-00080-CV, 2016 WL 6575232, at *3 (Tex. App.—Austin Nov. 4, 2016, pet. denied) (mem. op.) ("Vaughn testified that in her role as a paralegal and custodian of records, she had 'care, custody, and control of all records concerning the forcible entry and detainer proceeding against [the Ermisches].' She further described how records are made and kept on behalf of HSBC's law firm. Vaughn then identified the attachments as originals or exact copies of HSBC's records and proved them up as business records."); *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Mitchell v. State*, 750 S.W.2d 378, 379-80 (Tex. App.—Fort Worth 1988, pet. ref'd) ("Additionally, a qualified witness need not have personal knowledge as to the contents of the records but rather he need only have personal knowledge of the mode of preparation of the records.") (citing *Knapper v. State*, 629 S.W.2d 865, 867 (Tex. App.—Houston [14th Dist.] 1982, no pet.)); *U.S. Commodity Futures Trading Comm'n*, 594 F.3d at 416 (witness was not sufficiently qualified where she did not have sufficient "knowledge regarding the keeping of the records" or creation thereof); *United States v. Brown*, 553 F.3d 768, 792 (5th Cir. 2008) ("A qualified witness is one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) are met."); *id.* (affirmation of trial court's exclusion of evidence because the witness was not sufficiently qualified under Rule 803(6); although the witness "knew about the pharmacy computer system, how to operate the system, and how to extract information from it," there was no evidence he had any knowledge concerning the relevant entity's record keeping practices); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978) ("Under Fed.R.Evid. 803(6) . . . the testimony of the custodian or other qualified witness who can explain the record-keeping procedure is essential. If the witness cannot vouch that the requirements of Fed.R.Evid. 803(6) have been met, the entry must be excluded."); *id.* (holding witnesses without personal knowledge could not authenticate records under Rule 803(6)); *accord United States v. Reese*, 666 F.3d 1007, 1017 (7th Cir. 2012) (witness who lacked knowledge of how relevant information was generated was insufficiently qualified); *Dyno Constr. Co. v. McWane, Inc.*, 198 F.3d 567, 576 (6th Cir. 1999) (citing *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1150 (7th Cir. 1989) (noting that a person qualified to lay the foundation under Rule 803(6) need not even be an employee of the entity keeping the records, as long as the witness understands the system by which they are made)); and *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993) (qualified witness must have familiarity with the record-keeping system and the ability to attest to the foundational requirements of Rule 803(6)). *Cf. Echo*

hearsay rule . . . . This rule mandates that witnesses are qualified to testify to facts susceptible of observation only if it appears that they had a reasonable opportunity to observe the facts." 2 McCormick On Evid. § 247 (8th ed.). While "[m]odern technology is somewhat blurring the lines of what constitutes firsthand knowledge" (*id.* at n.1), the record before us does not reveal Franks had *any* relevant first-hand knowledge concerning the way *any* recording was kept, accessed, or copied. The record is therefore devoid of any fact which permits us to presume the strict requirements set forth in Rule 803(6) have been satisfied.

IV. Trustworthiness

The majority also concludes Appellant loses because he did not specifically object to the absence of trustworthiness at trial. This holding ignores the fact that, "[t]he hearsay exception for regularly kept records is justified on grounds of trustworthiness and necessity that underlie other hearsay exceptions." 2 McCormick On Evid. § 286 (8th ed.); *see also United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (holding the "regular practices and procedures surrounding the creation of the records" are "the very elements that are necessary for a finding of trustworthiness.") (citing *Louisville & Nashville R.R. Co. v. Knox Homes Corp.*, 343 F.2d 887, 895 (5th Cir. 1965)). Here, (1) someone else's name was on the recording of the recording, (2) someone else's SPN was on the recording of the recording, and (3) the proffered witness (a) was not a custodian of records, (b) was not a qualified witness, and (c) could not offer any trustworthy explanation as to how those errors

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Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1090 (10th Cir. 2001) (citing Federal Rule of Evidence 803(6) advisory committee's note (1972) describing rationale underlying exception as "[t]he element of unusual reliability . . . said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation") (citation omitted)).

occurred. These facts unavoidably invoke trustworthiness. *See* 2 McCormick On Evid. § 288 (8th ed.) ("significant mistakes and internal contradiction support exclusion for lack of trustworthiness") (citing *U.S. v. Bess*, 75 M.J. 70, 74 (Armed Forces App. 2016)). Objections to the admissibility of evidence under Rule 803(6) naturally attack the evidence's trustworthiness precisely because such trustworthiness is the naturally predominate justification for the carefully-crafted hearsay exception for records of regularly conducted business activities. *See, e.g.,* 2 McCormick On Evid. § 286 (8th ed.).

V. Burdens

Without citing any authority, the majority's analysis also presumes it was Appellant's burden to establish the inadmissibility of the State's hearsay. This is contrary to controlling law. *See Ortiz v. State*, 999 S.W.2d 600, 607 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (objection to hearsay "shifted the burden to the State to show that the evidence was not hearsay or admissible pursuant to a hearsay exception.").[7] The State's burden in this respect is long-standing. *See Moree v.*

[7] *See also Martinez v. State*, 178 S.W.3d 806, 815 (Tex. Crim. App. 2005) ("If the testimony fit some exception or exemption to the hearsay rule (or if the evidence was not being offered for the truth of the matter asserted) the State, as the proponent of the evidence, had the burden of demonstrating the applicability of that exemption or exception."); *Volkswagen of Am., Inc.,* 159 S.W.3d at 908 n.5 ("The proponent of hearsay has the burden of showing that the testimony fits within an exception to the general rule prohibiting the admission of hearsay evidence.") (citing *Skillern & Sons, Inc.,* 359 S.W.2d at 301); *In re R.H.W. III*, 542 S.W.3d 724, 738 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Volkswagen of Am., Inc.*, 159 S.W.3d at 908 n.5); and *In re E.A.K.*, 192 S.W.3d 133, 140-41 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (same). *Cf. White v. State*, 549 S.W.3d 146, 151-52 (Tex. Crim. App. 2018) (analyzing burdens); *Meador v. State,* 812 S.W.2d 330, 333 (Tex. Crim. App. 1991) (proponent has the burden to show statement meets the requirements of the rule); and *Long v. State*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990) ("As proponent of the evidence, the State had the burden to satisfy each element of this predicate for admission of the mother's testimony pursuant to Art. 38.072 . . . or to provide some other exception to the hearsay rule. Appellant did not waive his right to appellate review by failing to specifically cite to the statute or to request a hearing where the statute pertains only to hearsay statements of child abuse victims.").

State, 183 S.W.2d 166, 168-69 (Tex. Crim. App. 1944) ("It must be remembered that, in cases of this character where hearsay testimony is sought to be used against an accused and identifying him as the guilty party, the burden is upon the State to show that such testimony falls within an exception which authorizes the introduction of such testimony. Unless, then, the testimony is shown to fall within the exception, its admissibility has not been established."). "Because the State failed to carry its burden, the trial court erred in admitting the [evidence]." *De La Paz v. State*, 273 S.W.3d 671, 681 (Tex. Crim. App. 2008).

The State never suggested that Franks was "qualified" to be a witness in any capacity other than as a custodian of records. The State also cites to no authority for its conclusory presumption that we have jurisdiction to examine whether Franks was a qualified witness despite never arguing it at trial. The State's failure to cite any such authority waives the argument and we should ignore it in its entirety. *See Sarsfield v. State*, 11 S.W.3d 326, 328 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) ("The State does not support its conclusory argument with any authority, and this argument is waived.") (citing Tex. R. App. P. 38.1(h); *Lane v. State*, 933 S.W.2d 504, 511 & n.7 (Tex. Crim. App. 1996); and *Johnson v. State*, 853 S.W.2d 527, 533 (Tex. Crim. App. 1992)). These "ordinary notions of procedural default should apply equally to the defendant and the State." *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998). I accept this guidance from Texas' highest criminal court concerning equal application of the law in criminal cases and am deeply troubled by the majority's silent rejection thereof. To compound matters, the majority's erroneous acceptance of a hypothetical (yet still mistaken) justification never addressed by the trial court amplifies its erroneous focus on Appellant's alleged failure to attack the "trustworthiness" of the State's evidence,[8] particularly given the

[8] *See Davis v. State*, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994) ("The burden lies with

fact that the State's copy of the recording is inexplicably connected to some other inmate. Under these facts, this copy of a recording of an out-of-court statement being introduced to prove Appellant pulled a gun on complainant defies reason because it is ridiculously untrustworthy.[9]

VI. Harm

We cannot reverse a conviction due to the erroneous admission of hearsay testimony unless we conclude that it affected the appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008). An error affects a substantial right when it has a substantial and injurious effect or influence in determining the jury's verdict. *Taylor*, 268 S.W.3d at 592; *Saldinger v. State*, 474 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). An error does not affect a substantial right "if we have fair assurance that the error had no influence or only a slight influence on the jury." *Saldinger*, 474 S.W.3d at 7. Due to the unavoidable absence of such an assurance here (plus the presence

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the party seeking to admit the statement, and the test is not an easy one; the evidence of corroborating circumstances must *clearly* indicate trustworthiness.") (emphasis in original) (citing *United States v. Salvador,* 820 F.2d 558, 561 (2nd Cir.) (suspicion with which drafters regarded such statements by third parties is reflected in fact that burden is on accused to justify admission of statement and corroboration which must "clearly" indicate *trustworthiness* is "not an insignificant hurdle") (emphasis added)). *See also* 2 McCormick On Evid. § 288 (8th ed.) ("Logic places the initial burden on the proponent of the documents admission to show that it meets the basic requirements of the rule with the opponent having the burden to show lack of *trustworthiness* based on the source of information or the method or circumstances of preparation.") (emphasis added).

[9] *See Sneed*, 955 S.W.2d at 454 ("The *Porter* court [578 S.W.2d 742, 746 (Tex. Crim. App. 1979)] concluded that because the documents offered by the State and admitted at trial contained hearsay upon hearsay and opinions regarding the defendant from unnamed sources, it defied reason 'to suggest that [these documents], merely because they were collected in a file in a government office, have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination.' . . . . We recognize that in *Porter* the proponent of the erroneously admitted evidence was the State, but the analysis there is relevant here because the primary focus is the reliability of the evidence, not the status of the proponent.").

of an improperly admitted apparent confession from an unidentified person concerning materially similar facts), this erroneous admission of untrustworthy hearsay had a substantial and injurious effect or influence in determining the jury's verdict and therefore affected a substantial right.

Under these facts, the State should be estopped from arguing the admission of the calls did not affect a substantial right. In its appellate brief concerning legal sufficiency of the evidence, the State contends that, "for seven months, as documented in his jail calls, Appellant tried to get friends or family to bribe Soria so that she would either recant or not cooperate with prosecution." The only other facts cited by the State for legal sufficiency are (1) the complainant knew Appellant, (2) the complainant identified Appellant, (3) Appellant tried to evade capture, and (4) Appellant's phone calls concerning the complainant evidence his guilt because he knew she would "establish that he was the person who robbed her." Therefore, the State's active reliance upon inadmissible out-of-court statements to meet the standards of legal sufficiency where so few other facts establish Appellant's guilt beyond a reasonable doubt constitutes harm that demands reversal.

The record before us shows (1) all non-privileged phone calls in the Harris County Jail are recorded; (2) the calls in question were not privileged; (3) the system records both sides of each call; (4) both sides hear a recorded message saying "that the phone call could be recorded"; (5) phone calls are traced according to what SPN and pin number (specific to each inmate) are entered into the system; (6) Franks knew inmates stole or traded SPNs; (7) Franks knew each inmate's PIN was simply the inmate's month and day of birth (rather than a personally selected number); (8) someone else's name and SPN were on the disk containing the relevant statements; (9) Franks did not know if Appellant was in the jail at any relevant time; (10) Franks did not know Appellant's voice; (11) Franks did not make the disk;

(12) Galvan was "the only deputy" with relevant recordkeeping duties; (13) Galvan placed the phone calls on the disk "and did all the work"; (14) Galvan's name was on the disk revealing that he was the person who made it; and (15) Franks testified that said error was based on a "typographical error or mak[ing] two disks at the same time." Additionally, the person who was recorded said, "It's f***ed up what I did. I pointed the gun at her . . . . She called the law, that's the only reason they caught me." Therefore, this improperly admitted evidence affected a substantial right because (1) it constituted a confession concerning materially similar facts from one of thousands of inmates in Harris County's custody and (2) is tied to Appellant via (a) an incorrect name and (b) an incorrect SPN. These recordings lack the necessary "indicia of reliability sufficient to ensure the integrity of the fact finding process." *Sneed*, 955 S.W.2d at 454-55. This admission from an unknown person effectively corroborated the complainant (and only eyewitness). Without this unauthenticated confession, the jury could have reasonably chosen to disbelieve said witness.

VII. Conclusion

The trial court erred when it admitted recordings of out-of-court recordings of statements under the regularly conducted business activity exception to the prohibition against hearsay because they were not authenticated by a custodian of records or qualified witness. The majority errs by (1) approving the trial court's apparently implicit reliance on an exception to the prohibition against hearsay that was never presented (despite a valid objection), (2) approving the trial court's admission of evidence that lacks a sufficient indicia of reliability, and (3) faulting Appellant for neither (a) objecting to the hearsay at issue based on trustworthiness and (b) arguing Franks was not a "qualified witness". Even if the "qualified witness" exception to the prohibition against hearsay had been both presented in accordance with the State's burden and ruled upon, the trial court still abused its discretion

because there is no evidence tending to show (1) Franks was sufficiently "qualified" within the meaning of the rule, or (2) the evidence was even remotely trustworthy. Because these errors affected Appellant's substantial rights, his conviction should be reversed.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Frost, C.J., majority).
Publish — Tex. R. App. P. 47.2(b).

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